IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
December 16, 2008 Session

STATE OF TENNESSEE v. RICKY JAMES GREEN

Direct Appeal from the Circuit Court for Blount County
No. C-15889 W. Dale Young, Judge

No. E2008-00424-CCA-R3-CD - Filed October 5, 2009

On September 25, 2006, Defendant, Ricky James Green, entered a plea of guilty to statutory rape, a Class E felony. On November 17, 2006, the trial court sentenced Defendant to two years, which sentence was suspended and Defendant placed on sex offender probation. On September 19, 2007, a violation of probation warrant was issued alleging that Defendant had violated the terms of his probation by procuring Internet access at his residence without the written permission of his probation officer. Following a revocation hearing, the trial court revoked Defendant's probation and ordered him to serve the balance of his sentence in confinement. On appeal, Defendant challenges the revocation of his probation. After a thorough review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Charles Dungan, Maryville, Tennessee, the appellant, Ricky James Green.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Mike Flynn, District Attorney General; Robert L. Headrick, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Carolyn Brewer, a parole officer with the Tennessee Board of Probation and Parole, testified that Defendant's case was assigned to her in August 2007. Ms. Brewer stated that her files indicated that the sex offender directives were reviewed with Defendant on October 3, 2006, and November 13, 2006, and that Defendant had signed the forms on each occasion signifying that he had read and understood the directives. Ms. Brewer met with Defendant on August 14, 2007, and again reviewed the main sex offender directives with Defendant, including the prohibition against having Internet

access. Defendant told Ms. Brewer that he had a computer in his residence and that his former supervisor, Officer Robert Montgomery, was aware that the Internet could be accessed through the computer.

On cross-examination, Ms. Brewer acknowledged that sex offender directive no. 2 on the form dated October 3, 2006, and signed by Defendant and Officer Mike Caldwell, reads:

> I will not obtain Internet access on any computer unless my probation/parole officer has approved permission for Internet capability in writing. I will not utilize a computer for any sexually oriented purpose. I further consent to the search of my computer and any software at any time by my Officer.

Ms. Brewer also acknowledged that sex directive no. 2 on the form dated November 13, 2006, and signed by Defendant and Officer Montgomery, contained essentially the same language except that the directive provided that Defendant agreed not to obtain Internet access "unless [his] officer has given [him] written permission." Ms. Brewer agreed that Defendant was "forthcoming" with the information concerning his personal computer and Internet access and that Defendant told Ms. Brewer that he had never accessed the Internet with the computer. Ms. Brewer also agreed that Defendant had complied with the other terms of his probation such as maintaining employment, attending the requisite classes, submitting to two polygraph tests, making scheduled appointments, and remaining current on the fees and costs of his probation.

Mr. Montgomery testified that he began supervising Defendant's probation in November 2006. Mr. Montgomery stated that he reviewed the sex offender directives with Defendant, and Defendant signed the directives form. Mr. Montgomery said that he did not give Defendant written permission to obtain Internet access. After the initial meeting in November 2006, Mr. Montgomery met with Defendant and four or five family members at the residence of Defendant's mother to go over the sex offender directives.

On cross-examination, Mr. Montgomery said that he did not recollect asking Defendant specifically if he had a computer at his mother's residence. Mr. Montgomery stated that Defendant's mother and fiancee attended the chaperone classes offered to family members of sex offenders. Mr. Montgomery agreed that Defendant complied with the other terms of his probation.

Melissa Tipton Green, Defendant's wife, testified that she and Defendant married on April 27, 2007, but the couple had known each other since 2002. Ms. Green said that Mr. Montgomery approved the marriage and approved Ms. Green's residence as a proper residence for Defendant under the sex offender directives. Ms. Green said that she purchased a computer in 2006 and obtained Internet access through a service provider. Ms. Green kept the computer in her home office and used it for business purposes.

Ms. Green said that after she learned that the computer presented a problem, she attempted to cancel the account with the service provider, but she was unsuccessful because the account was

in Defendant's name. Ms. Green stated that the Internet access fees were deducted from Ms. Green's and Defendant's joint account. Defendant cancelled the service provider's contract from his place of employment, effective September 13, 2007. Ms. Green printed off the confirmation of the cancellation from her work computer on September 17, 2007, and then left town on a business trip. Before she returned, Defendant was arrested on the probation violation warrant. Ms. Green stated that she no longer had access to the Internet on her computer.

On cross-examination, Ms. Green explained that she set up the account with the service provider under Defendant's name because his name was listed first on the joint checking account. Ms. Green stated that she understood that Defendant was prohibited from having Internet access in his home.

Defendant testified that Ms. Green had owned a computer at least since 2002. Defendant said that he and Ms. Green purchased a new computer in 2006 with funds from the couple's joint checking account. Defendant stated that Ms. Green was the primary user of the computer, and he only logged on to the computer in order to download his digital photographs. Defendant acknowledged that his password was needed to access the Internet from the home computer, but Defendant did not remember the password. Defendant stated that he thought sex offender directive no. 2 prohibited Internet access in general, not the possession of a computer in his home.

Defendant stated that he did not see the service provider's notice of confirmation that Ms. Green printed from her work computer. Defendant said that he did not realize that the service provider allowed Internet access for thirty days after cancellation. Defendant telephoned the service provider after he was released from jail on September 21, 2007, and cancelled the account without the thirty-day grace period. Defendant stated that he had not accessed the Internet since his probation began.

On cross-examination, Defendant said that he did not recollect telling Ms. Brewer that Mr. Montgomery had given him permission to access the Internet. Defendant acknowledged that he knew that the computer in his residence had Internet access.

Ms. Brewer was called as a rebuttal witness. Ms. Brewer stated that she and Defendant discussed Defendant's possession of a computer on August 14, 2007, and the fact that he had access to the Internet. Ms. Brewer said that Defendant told her that Mr. Montgomery knew about the computer and "it was not an issue." Ms. Brewer spoke with Mr. Montgomery later that day, and Mr. Montgomery said that he was not aware that Defendant owned a computer.

II. Standard of Review

A trial court may revoke probation and order imposition of the original sentence upon a finding by a preponderance of the evidence that the person has violated a condition of probation. T.C.A. §§ 40-35-310, -311; State v. Shaffer, 45 S.W.3d 553, 554 (Tenn. 2001). This court reviews a revocation of probation under an abuse of discretion standard. State v. Stubblefield, 953 S.W.2d

223, 226 (Tenn. Crim. App. 1997) (citing State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)). This means that the trial court will be affirmed unless the record contains no substantial evidence to support the conclusion of the trial court. Harkins, 811 S.W.2d at 82. If the trial court finds by a preponderance of the evidence that the defendant has violated a condition of probation, the court has the authority to revoke the probation and reinstate the judgment as originally entered. T.C.A. § 40-35-311(e). Discretion is abused only if the record contains no substantial evidence to support the trial court's conclusion that a violation has occurred. Harkins, 811 S.W.2d at 82.

III. Revocation of Probation

Defendant argues that the evidence preponderates against the trial court's finding that a violation of his probation has occurred. Defendant contends that the wording of sex offender directive no. 2 is ambiguous, and his interpretation, that he will not use a computer to access the Internet, is reasonable. Defendant submits that he has never accessed the Internet since the commencement of his probation, and that he has complied with all other terms of his probation.

Directive no. 2 clearly provides that Defendant "will not obtain Internet access on any computer" without prior written approval of his probation officer. Defendant executed two "sex offender directives" forms on October 3, 2006, and on November 13, 2006, indicating that he had read and understood the directives. Ms. Brewer reviewed the sex offender directives with Defendant in August 2007, when she assumed responsibility for the supervision of his probation. During the meeting, Ms. Brewer asked Defendant if he had access to the Internet, and Defendant responded affirmatively. Defendant and Ms. Green acknowledged at the revocation hearing that their home computer was set up to access the Internet through a service provider. The account with the service provider was established under Defendant's name, and the password used to gain access was in Defendant's name. Mr. Montgomery testified that he did not give Defendant written permission to access the Internet on his home computer.

The trial court found:

> [i]t's as clear as a bell that you were instructed time and again that you would not obtain Internet access on any computer unless your probation officer approved the obtaining of your Internet access in writing. The proof in this case is unrefuted that the Internet access at your home was, first of all, in your name and was password protected by your password.

Based on our review, we conclude that the evidence does not preponderate against the trial court's finding that Defendant violated the terms of his probation by obtaining access to the Internet on his personal computer, and that substantial evidence supports the trial court's finding. Defendant is not entitled to relief on this issue.

Relying on State v. Beard, 189 S.W.3d 730 (Tenn. Crim. App. 2005), Defendant also argues that the trial court erred in considering the circumstances of the underlying offense when revoking his probation and reinstating his original sentence. In Beard, the defendant entered a plea of guilty to rape, a Class B felony, and was sentenced to eight years as a Range I, standard offender, which sentence was suspended and the defendant placed on probation. Id. at 731. After violating his probation and spending nine months in jail, the defendant was reinstated to probation. Id. The defendant violated his probation a second time, and the trial court ordered the defendant to serve an additional year in jail as a part of a split confinement sentence. Id. at 731-32. After the defendant had completed his one-year sentence of confinement, the trial court held a "status" hearing. Id. at 733. At the conclusion of the hearing, the trial court "expressed regret that it had delayed making a decision on whether to send the defendant to prison," and ordered the defendant to serve the balance of his sentence in confinement. Id. at 734.

The Beard court observed that "it is not permissible for trial courts to base revocation on criminal acts that were known at the time probation was granted." Id. at 737. Although the circumstances of the offense played a role in the trial court's findings, however, the "real issue [was] whether the trial court properly ordered the defendant to serve the balance of his original eight-year sentence in the Department of Correction." Id. at 735. We concluded "that because the defendant had been held in violation of the terms of his probation and had been sentenced to split confinement in the local correctional facility, the trial court lacked authority to sentence the defendant to the Department of Correction absent any new violation of probation." Id.

The case sub judice presents a situation more like the one considered in State v. Marcus Nigel Davis, No. E2007-02882-CCA-R3-CD, 2008 WL 4682238 (Tenn. Crim. App., at Knoxville, Oct. 23, 2008), no. perm. to appeal filed. In this case, the defendant entered pleas of guilty to three counts of sexual battery, a Class E felony, and was sentenced to an effective sentence of six years, with one year to be served in confinement and the remaining balance to be served on enhanced probation. Marcus Nigel Davis, 2008 WL 4682238, at *1. The trial court subsequently found that the defendant violated the terms of his probation by losing his electronic monitoring device so that he could not be tracked for a period of time, missing curfew, and missing one of the required sex offender classes. Id. at *2. However, the trial court also considered the defendant's history of prior criminal convictions, his past failures to comply with the terms of a probationary sentence, and the circumstances of the offenses. Id. at *2-3.

The Davis court noted that:

> a trial court's reliance on a defendant's past criminal history in making a probation violation determination can be problematic. To begin, our sentencing statutes contemplate a rationale where the revocation of probation must be predicated upon a showing of conduct which occurs subsequent to the grant of probation. See State v. Shannon Lee Beckner, No. 923, 1991 WL 43545 at *4 (Tenn. Crim. App., at Knoxville, April 2, 1991). As expressed in our statutes, the aim of the sentencing court is to acquire and assess all the relevant information about the defendant

> including his character and criminal history prior to determining the appropriate sentence and the manner in which that sentence is to be satisfied. See e.g., T.C.A. § 40-35-103; -210. The court's sentencing determination should encompass the unfavorable information, as well as the favorable, and few things are as relevant as the defendant's prior criminal conduct. See id. Therefore, if a defendant's criminal conduct was known before probation was granted, there is a presumption that the defendant's criminal conduct was part of the earlier sentencing equation, and the criminal conduct should not be used for a subsequent revocation.

Id. at *4. Accordingly "if a trial court, with knowledge of the prior criminal act, chooses to grant probation, it should not be allowed to base a later revocation on that criminal act." Id. at 5.

In the case sub judice, the trial court observed that:

> [p]robation is not a privilege. Most people who admit their guilt as you did for a heinous crime serve their sentence in the state penitentiary. You were given a break. Had I been the judge at the time, I probably would not have approved that break. That's just my take on the whole thing.

However, even if this observation could be construed as an improper consideration of Defendant's prior criminal act during the revocation process, the trial court nevertheless revoked Defendant's probation on the basis that he violated the prohibition against obtaining Internet access on a computer, and, as previously noted, there is substantial evidence supporting the trial court's findings. See Marcus Nigel Davis, 2008 WL 4682238, at *5 (concluding that notwithstanding the trial court's review of the defendant's past criminal history, the record contained substantial evidence to support the trial court's findings that the defendant had violated the conditions of his probation). Defendant is not entitled to relief on this issue.

IV. Trial Court's Jurisdiction

Defendant argues that the trial court lacked jurisdiction to revoke his probation because a different trial court presided over the sentencing hearing. Tennessee Code Annotated section 40-35-311(b) provides that:

> [w]henever any person is arrested for the violation of probation and suspension of sentence, the trial judge granting such probation and suspension of sentence, the trial judge's successor, or any judge of equal jurisdiction who is requested by such granting trial judge to do so shall, at the earliest practicable time, inquire into the charges and determine whether or not a violation has occurred, and at such inquiry, the defendant must be present and is entitled to be represented by counsel and has the right to introduce testimony in the defendant's behalf.

Defendant points out that Judge Richard R. Baumgartner presided over his sentencing hearing, and the record does not contain a request by Judge Baumgartner that Judge Young conduct the revocation hearing. Nonetheless, Defendant concedes that he did not object to Judge Young presiding over his revocation hearing. See State v. Kendrick D. Hutton, No. M2004-00586-CCA-R3-CD, 2005 WL 1931405, at *1 (Tenn. Crim. App., at Nashville, Aug. 11, 2005), no perm. to appeal filed (concluding that the defendant waived any objection to the trial court presiding at his probation revocation hearing by failing to enter a contemporaneous objection); see also State v. Agee Gabriel, No. M2002-01605-CCA-R3-CD, 2004 WL 1562551, at *3 (Tenn. Crim. App., at Nashville, July 12, 2004), no perm. to appeal filed.

Defendant argues, however, that had he known that Judge Young would consider the exhibits introduced at the sentencing hearing during the revocation process, he would have interposed an objection under Tennessee Code Annotated section 40-35-311(b). Defendant submits that the "sentencing judge would be familiar at least with all of the proof earlier considered." As noted previously, Defendant's probation was revoked not because of the circumstances of the offense but because he violated a condition of his probation which the trial court found to be "clear as a bell." Moreover, in Kendrick D. Hutton, the panel noted that a "defendant cannot withhold an objection regarding which trial judge is presiding at a revocation hearing, and then make an objection if he is unhappy with the results of the hearing." Kendrick D. Hutton, 2005 WL 1931405, at *2 (citing State v. Billy Gene Oden, Jr., No. 01C01-9710-CC-00468, 1998 WL 840007, at *2 n. 3 (Tenn. Crim. App., Nashville, Dec. 7, 1998), no perm. to appeal filed ("We decline to establish authority which would allow a defendant to [go] 'forum shopping' by sitting on an objection to the presiding judge at a revocation hearing and then raising it for the first time on appeal in order to get a second revocation hearing."))

Based on the foregoing, Defendant is not entitled to relief on this issue.

V. Full Confinement

Defendant argues that the trial court erred in sentencing him to full confinement. Defendant points out that he was an "exemplary probationer" other than the one violation. Even as to this negative factor, Defendant continues to maintain that the rule prohibiting the obtaining of Internet access was ambiguous and questions "whether there was even proof that it was explained" to him.

Once a trial judge has determined a violation of probation has occurred, the trial judge retains discretionary authority to order the defendant to: (1) serve his sentence in incarceration; (2) serve the probationary term, beginning anew; or (3) serve a probationary period that is extended for up to an additional two years. State v. Hunter, 1 S.W.3d 643 (Tenn. 1999). This determination of the proper consequence of the probation violation embodies a separate exercise of discretion. Id.

The trial court thus had the statutory authority to order Defendant to serve his entire sentence in confinement. Based on our review of the record, we conclude that the trial court did not abuse

its discretion in ordering Defendant to serve his sentence in confinement. Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE